No. 17502

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOS ANGELES JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, an unincorporated voluntary association,

Plaintiff and Appellee,

vs.

GRUNWALD-MARX, INC.,

Defendant and Appellant.

On Appeal From Order and Judgment Granting Summary Judgment and Denying Summary Judgment and Order Directing Arbitration.

BRIEF FOR APPELLANT.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

Textbooks

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BRIEF FOR APPELLANT.

The United States District Court has jurisdiction by virtue of the authority of Section 185, Title 29 U. S. C. A., which authorizes suits for violation of contracts between an employer and a labor organization to be brought in any District Court of the United States having jurisdiction of the parties without regard to the citizenship of the parties.

This court has jurisdiction of this appeal by virtue of the authority of Section 1291, Title 28 U. S. C. A., which authorizes appeals from all final decisions of the District Courts of the United States.

An order directing arbitration pursuant to Section 185, Title 29 U. S. C. A. is a final decision and appealable. *Goodall-Sanford, Inc. v. United Textile Workers,* 353 U. S. 550, 1 L. Ed. 2d 1031.

The amended complaint alleges that suit is based on violation, and seeks performance, of a contract between a labor organization representing employees in an industry affecting interstate commerce, as defined in the Labor Management Relations Act of 1947, as amended, and an employer engaged in operations affecting interstate commerce within the meaning of said Act [Tr. p. 13]. The amended complaint alleges that the United States District Court has jurisdiction over the persons and subject matter under and pursuant to the provisions of Section 185(a), Title 29 U. S. C. A. [Tr. p. 13]. The trial court found the facts in the amended complaint relating to jurisdiction to be true [Tr. pp. 110-111].

Statement of the Case.

This is a suit for specific performance to compel arbitration under and pursuant to Section 301(a) of the Labor Management Relations Act, as amended (Sec. 185, Title 29 U. S. C. A.). The amended complaint alleges that plaintiff union and defendant company were parties to a collective bargaining agreement, which expired September 30, 1959; that Article 14 of the collective bargaining agreement provides for the settlement by arbitration of all complaints, grievances or disputes arising between the parties relating, directly or indirectly, to the provisions of the said agreement; that Article 15 of the said agreement prohibits strikes and work stoppages for any reason, or cause, whatsoever; that on May 29, 1957, defendant moved its manu-

facturing plant from Long Beach, California to Phoenix, Arizona; that, as a result thereof, a controversy arose in that plaintiff contends that defendant breached the said agreement by manufacturing its products in its Phoenix plant and did further breach the agreement by locking out its employees at the Long Beach plant; that said lockout has been continuous to September 30, 1959 in violation of Article 15 of the collective bargaining agreement; that defendant thereby has deprived employees of wages, holiday pay, vacation pay, and insurance contributions and caused plaintiff to lose membership dues and initiation fees; that the dispute has been taken up between representatives of plaintiff and defendant without agreement and that defendant refuses to arbitrate the matter pursuant to paragraph 14 of the collective bargaining agreement.

The prayer of the amended complaint is that defendant specifically be required to perform Article 14 of the collective bargaining agreement, particularly with respect to the dispute, as it is described in the amended complaint.

The defense of defendant is that prior to the filing of the instant action, plaintiff filed an action in the Los Angeles Superior Court to compel arbitration of the subject matter and claims set forth in the amended complaint; that trial of the issues was held in the Los Angeles Superior Court and an order denying plaintiff's petition to compel arbitration was granted; that the judgment was affirmed on appeal to the District Court of Appeal; that by virtue of the filing of the prior action in the State Court, plaintiff is barred from prosecuting this action in the Federal District Court under federal law and the instant action should be abated.

For a second defense, defendant alleged that plaintiff had made an election of remedies in filing the petition in the Los Angeles Superior Court for specific performance to compel arbitration of the same subject matter and claims and is be barred from prosecuting the instant action.

For a third defense, defendant alleged that by virtue of the prior State Court action, plaintiff is estopped from prosecuting the instant action.

For a fourth defense, defendant alleged that there has been an unreasonable delay of three and one-half years on the part of plaintiff in requesting arbitration of matters set forth in the amended complaint and plaintiff is estopped from now demanding arbitration of said matters.

For a fifth defense, defendant alleged that plaintiff has no legal capacity to demand or compel arbitration of wage claims for individual employees since claims for wages are a uniquely personal right to each individual employee, arising out of contracts of hire, which are separate and apart from the collective bargaining agreement.

Defendant prayed for judgment that plaintiff take nothing by its amended complaint.

Plaintiff and defendant both moved for summary judgment. The facts are not in dispute. The trial court granted plaintiff's motion for summary judgment and denied defendant's motion for summary judgment. The trial court ordered that within thirty days after entry of judgment, plaintiff and defendant proceed to arbitrate the controversies existing between them in accordance with the terms of the collective bargaining agreement.

Statement of Questions Presented.

Did the District Court err in finding that it is for an arbitrator, and not for the District Court, to determine the merits of the disputes between plaintiff and defendant, including any and all of the defenses raised by defendant in its amended answer?

I.

The State Court Action Is a Bar to the Instant Case and the Instant Case Should Be Dismissed.

In the State Court action filed by plaintiff to compel arbitration, the basis of the lawsuit is that because defendant closed its manufacturing plant in Long Beach and moved it to Phoenix, defendant owes its employees vacation pay and holiday pay. This is the basis of the instant action in the Federal Court. In the State Court action, plaintiff sought vacation pay pursuant to paragraph 9 of the collective bargaining agreement, and holiday pay pursuant to paragraph 11 of the collective bargaining agreement. In this action, among other things, plaintiff seeks vacation pay and holiday pay for the same employees pursuant to paragraphs 15 and 17 of the contract. The prayer of the State Court action was that the court issue an order directing arbitration to proceed as to the dispute over vacation and holiday pay for all persons on the payroll of the company prior to closing the plant in California. Plaintiff sought, in the State Court action, an interpretation of paragraph 9 and paragraph 11 of the contract to determine if employees were entitled to vacation and holiday pay. The Los Angeles Superior Court denied plaintiff's petition to compel arbitration and this judgment was affirmed by the District Court of Appeal. How-

ever, the California Supreme Court reversed the judgment in *Posner v. Grunwald-Marx, Inc.,* 56 A. C. 159, and ordered plaintiff and defendant to arbitrate the dispute over vacation and holiday pay.

Prior to the decision of the California Supreme Court and fearful that it might lose its right to arbitrate vacation and holiday pay, plaintiff filed this action in the Federal District Court in an attempt to recover, among other things, vacation and holiday pay, based on the same facts *but upon a different theory,* to wit, that vacation and holiday pay was owed employees by virtue of paragraphs 15 and 17 of the collective bargaining agreement. The original complaint on file herein covered the identical claims for damage set out in the State Court action, in addition to claims for vacation and holiday pay for 1958 and 1959, plus wages for the employees for three years and loss of dues to the union. Realizing the weakness of its position, plaintiff amended its complaint so as to take out of the amended complaint claims for damages for vacation pay in 1957 and holiday pay for Decoration Day in 1957.

It is defendant's position that where there is a breach of an entire and indivisible contract, there can arise but one cause of action and if in the action to enforce that cause of action, plaintiff does not demand the entire relief to which it is entitled, it cannot afterwards sue for the balance. Defendant submits that plaintiff has illegally split its cause of action and that the State Court action is a bar to this action and that this action should be dismissed as a result of the final determination of the State Court action by the California Supreme Court.

Plaintiff seeks to avoid this principal of law by asserting that the contract is divisible by its terms and may give rise to more than one cause of action. Plaintiff asserts that the breach of contract by defendant was a continuous one up to the expiration of the agreement on September 30, 1959, and that the federal action is to recover for breaches that occurred subsequent to the filing of the State Court action.

It should first be pointed out that the original petition was filed in the State Court on October 27, 1957, but that the third amended petition was not filed by plaintiff in the State Court until October 6, 1959. This was after the expiration of the collective bargaining agreement on September 30, 1959. Plaintiff could have put into its third amended petition in the State Court action all of the claims for damages which it now asserts in this action.

Apart from the foregoing, however, the law is clear that persons who are discharged in violation of a contract may sue only once and at that time recover all present and prospective damages. In *Shatte v. International Alliance,* 182 F. 2d 158, this court said at page 164:

> "The complaint alleges that appellants were forced to leave their employment on or about September 23, 1946. Thus, whatever breach of contract is alleged took place at least nine months before the enactment of the statute [the Taft-Hartley Act]. Appellant stressed the allegations of the complaint that appellees have continuously maintained a *'mass lockout' against appellants* down to the time of the complaint as establishing a 'continuous breach' extending until after the en-

actment of Section 301. The breach of contract alleged was total and absolute on or about September 23, 1946, and the cause of action, if any, for such breach accrued in its entirety at that time. *The general rule is that an employee who is discharged in violation of its contract of employment may sue only once and at that time recover all present and prospective damages.* (Citing authorities.) . . . The alleged continuous acts of barring appellants from employment subsequent to the enactment of Section 301 concededly might serve to enhance the damages for a breach of contract to which liability had already attached, but such acts could not in themselves constitute 'violation of contract' within the meaning of Section 301 because according to the complaint no contracts between appellants and appellee remained outstanding." (Emphasis added).

In 1 American Jurisprudence p. 487, it is said:

"For the breach of an entire and indivisible contract, there can arise but one cause of action, and if in the action to enforce that cause of action the plaintiff does not demand the entire relief to which he is entitled, he can not afterwards sue for the balance."

Again, at 1 American Jurisprudence 490, it is said:

"The rule supported by the great weight of authority is that after the discharge, as the employee performs no more services, *he is entitled no longer to wages as such;* he can not elect, according to the majority rule, to consider the contract as still in force to the extent of holding himself ready to perform, and bring successive actions for future

installments of wages provided for under the contract, based on the fiction of constructive service; his only cause of action is either one for damages for a breach of the contract of employment to recover damages both present and prospective, or one based on a rescission of the contract to recover the value of services actually rendered." (Emphasis added).

In 1 Cal. Jur. 2d p. 704, it is said:

"The rule against splitting a single cause of action applies to both contractual and delictual causes, and to actions against municipal corporations as well as against individuals. . . . Thus, an employee who is discharged in violation of his contract of employment may ordinarily sue only once, and at that time recover all present and prospective damages."

In *Wulfjen v. Dolton,* 24 Cal. 2d 891, the California Supreme Court holds that a party may not split up a single causes of action and make it the basis of separate suits and, if he does, the first action may be pleaded in abatement of any subsequent suit on the same claim. The Supreme Court said that the rule against splitting a cause of action is based on two reasons: (1) the defendant should be protected against vexacious litigation and (2) it is against public policy to permit litigants to consume the court's time by relitigating matters already judicially determined or by asserting claims which properly should be settled in some prior action. The Supreme Court concluded by holding that the violation of one primary right constitutes a single cause of action though it may entitle the injured party to many forms of relief and the relief is not to be con-

founded with the cause of action, one not being determinative of the other.

The trial court stated in its opinion and order: "The defendant's contention that the union 'is splitting its cause of action' important in traditional concepts of contract law, is invalid in the federal law of arbitrability of labor disputes." The trial court cites no authority for this statement. Certainly, the reasons given by the California Supreme Court for the rule against splitting a cause of action is just as applicable to this situation as to the splitting of any other cause of action. The relationship between plaintiff and defendant has been terminated since May, 1957, and the reasoning of the United States Supreme Court (based on a continuing relationship between the employer and the union) in *United Steelworkers of America v. American Manufacturing Co.*, 363 U. S. 564, *United Steelworkers of American v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 373 U. S. 593, has no application to this case.

There is no question but what plaintiff could have demanded arbitration of asserted breaches of contract because of the closing of defendant's plant, and claimed all damages arising therefrom, at the time the plant closed on May, 1957. All of the *damage* which plaintiff claims in this action should have been included in the State Court action. The reason that the claims were not asserted in the State Court action is that they are obviously frivolous. Plaintiff contends that defendant has violated Section 17 of the collective bargaining agreement, which provides:

> "During the term of this agreement, the company shall not without the consent of the union,

directly or indirectly, manufacture garments or cause them to be manufactured in any other factory other than its own factories, unless its employees in its own factories are first supplied with work." [Tr. p. 29].

The uncontradicted affidavit of Grunwald states that defendant has never, directly or indirectly, manufactured garments or caused them to be manufactured in any factory other than its own factories, unless its employees in its own factories were first supplied with work [Tr. p. 103]. The claim of plaintiff is frivolous in that plaintiff is complaining about the manufacture of defendant's garments in its own Phoenix, Arizona plant, which is clearly permitted by virtue of paragraph 17 of the agreement. Plaintiff only became brave enough to file an actin of this type three and one-half years after the closing of defendant's plant because of the decision of the United States Supreme Court in the *United Steelworkers* case, *supra,* in which the Supreme Court said that "even frivolous claims should be arbitrated because of their therapeutic value."

The claim that defendant violated paragraph 15 of the collective bargaining agreement by maintaining a lockout is equally frivolous. In *Ryan Aeronautical Co. v. International Union,* 173 Cal. App. 2d 463, 466, 467, "lockout" is defined as "to withhold employment from (a body of employees) as a means of bringing them to accept the employer's terms (citing cases)." A lockout contemplates a continuing employment relationship between employer and employee. In the instant case, the employees were permanently terminated by the last week of May, 1957. None of the employees was ever re-employed and the Long Beach plant was closed permanently [Tr. p. 98]. Here again, is a

completely frivolous claim buttressed only by language of the Supreme Court in the *United Steelworkers* cases, *supra,* language which only has meaning where there is to be a continuous relationship between employer and union.

Defendant is entitled to protection against vexacious litigation as much as any other citizen. If plaintiff is free to split one cause of action into numerous individual claims, defendant will never see the end of it. Under the reasoning of the trial court, plaintiff can demand arbitration for vacation pay for 1957, 1958 and 1959 in separate actions. Plaintiff can demand arbitration of claims for each of more than 200 former employees for each separate year in separate actions and this could go on and on covering holiday pay, wages, insurance contributions and the like for each employee for each year. More than that, according to plaintiff's theory, adopted by the trial court, plaintiff is free to demand arbitration of a dispute involving vacation pay for each separate year for each employee not simply under the theory of Section 9 of the collective bargaining agreement but separate action could be brought based on Sections 15 and 17 of the collective bargaining agreement to recover vacation pay.

Plaintiff says that defendant must refuse to arbitrate each separate item of damage flowing from the primary breach, which was the termination of the employees' employment by virtue of the closing of defendant's plant in May of 1957. We respectfully submit that this statement is contrary to law. In *Panos v.*

Great Western Packing Co., 21 Cal. 2d 636, the California Supreme Court states that a judgment on the merits operating by way of bar against a second cause of action on the same cause of action concludes not only every matter which was, but every matter which might be, urged in support of the claim. Accord, *Evans v. Horton,* 115 Cal. App. 2d 281. A party to a collective bargaining agreement is not entitled to split a demand to arbitrate one primary right into two causes of action any more than a party can do so in any other situation. A demand to arbitrate can not be looked at in a vacuum. We must look at what it is that the union wants to arbitrate. The union wants to arbitrate in the federal action the same primary breach (if there was a breach) which is the subject of the State action. The factual basis of both is identical. The only difference between the two actions is that plaintiff is seeking damages in the federal action under different theories and different provisions of the collective bargaining agreement. The basic issue before the arbitrator in the State Court proceeding is whether or not the company breached the contract by closing its plant and terminating its employees in May, 1957. This is the same issue which would be presented to an arbitrator in the instant action. The only difference would be in the remedy. We have previously pointed out, however, that the relief sought is not to be confused with the basic cause of action and one is not determinative of the other.

II.

An Arbitrator Does Not Have Jurisdiction to Determine His Own Jurisdiction.

It is true, as pointed out by the trial court, that the United States Supreme Court in *United Steelworkers* cases, *supra,* has limited the scope of inquiry of the Federal District Court on a petition to compel arbitration. What the United States Supreme Court was talking about, however, was questions of contract of interpretation. The Supreme Court said that the trial court's function is to ascertain whether the party seeking arbitration is making a claim which on its face is governed by the contract. The Supreme Court was talking about the merits of a controversy. The court stated that arbitration should be ordered, even though the claim lacks merit if the claim on its face is governed by the contract. This situation is different. It involves procedural matters. Waiver of the right to arbitrate has been raised as a defense, as has estoppel and election of remedies. Waiver, abatement of the action, and splitting of causes of action are matters with which a lay arbitrator is wholly unfamiliar. These are matters which have traditionally been the prerogative of the court. The trial court holds that it is for the arbitrator to determine whether plaintiff has split its cause of action, whether there has been a waiver of the rights to arbitrate, and the extent to which the State Court action precludes the arbitration which is the outgrowth of this action. The recently enacted California arbitration statute provides, by comparison, that the trial court shall determine whether or not the right to compel arbitration has been waived by the petitioner before an order to arbitrate shall issue. Section 1281.2 California Code of Civil Procedure. It has long been

the law that an arbitrator does not have jurisdiction to determine his own jurisdiction unless such right is expressly given in the collective bargaining agreement. In *McCarroll v. L. A. County District Council of Carpenters,* 49 Cal. 2d 45, the California Supreme Court states that it is outside the usual understanding of the relations of court and arbiter, and their respective functions, to assume that the parties to a contract intended to leave an arbitrator the question of arbitrability. The California Supreme Court said that the court can not avoid the necessity of making a threshold determination of arbitrability, namely, whether the parties have, in fact, conferred such a power on the arbiter. *McCarroll v. L. A. County District Council, supra,* 49 Cal. 2d 45, 65, 66. We submit, therefore, that it is error for the trial court to refuse to determine procedural issues which traditionally it has been the function of the court to determine before ordering arbitration. We submit that it was error for the trial court to hold that the question of arbitrability is for the arbitrator to decide, without making a preliminary finding that the parties, by the collective bargaining agreement, intended that the question of arbitrability should be decided by the arbitrator. No such finding was made in this case, and none should be made based on the language of the collective bargaining agreement.

Section 301(a) of the Labor Management Relations Act, as amended, provides that "suits for *violation* of the contracts between an employer and a labor organization . . . may be brought in any district court of the United States. . . ." (Emphasis added.) How can it be said that defendant is in violation of the collective bargaining agreement if, in fact, by conduct, or other-

wise, plaintiff has waived its right to arbitrate or has made an election of remedies, which would preclude the instant action?

Section 15 of the collective bargaining agreement provides:

> "The consideration of stoppage and lockout cases shall have precedent over, or shall be considered simultaneously with, complaints or grievances." [Tr. p. 55.]

Here is a complete violation of the terms of the collective bargaining agreement by *plaintiff*. By the terms of the contract, a lockout complaint must be considered at least simultaneously with the grievances and complaints set forth in the original State Court action. Can it be said that defendant is in violation of the contract in refusing to arbitrate a lockout case when the collective bargaining agreement requires that it be filed simultaneously with complaints set forth in the State Court action?

It is defendant's contention, that the trial court erred in finding that procedural matters relating to waiver, estoppel, election of remedies, splitting of causes of action and pleas in abatement are matters for the arbitrator to determine. These issues traditionally have been determined by the courts, and the United States Supreme Court has not held otherwise in the *United Steelworkers* cases, *supra*.

Conclusion.

It is respectfully submitted that plaintiff has split its cause of action to arbitrate and that the federal action was filed to recover damages arising out of the same basic primary right that is the subject matter of the State action under a different theory and different provision of the contract. This is prohibited by case law. Where employees are discharged in breach of a contract of employment, the cause of action is entire and accrues at the time of discharge. At that time suit must be brought to recover all damages, both present and prospective, and a second suit based on the same breach to recover damages under a different theory is prohibited. Further, the trial court erred in finding that an arbitrator has jurisdiction to determine his own jurisdiction. It is the contention of defendants that the question of arbitrability of a dispute, which involves procedural matters such as waiver, estoppel, plea in abatement and the like, are matters which must preliminarily be determined by the court before ordering arbitration.

Respectfully submitted,

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